

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



August 28, 2003

TO: PARTIES OF RECORD IN CASE 02-11-053

This proceeding was filed on November 19, 2002, and is assigned to Commissioner Brown and Administrative Law Judge (ALJ) Simon. This is the decision of the Presiding Officer, ALJ Simon.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 8.2 of the Commission's Rules of Practice and Procedure.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ ANGELA K. MINKIN

Angela K. Minkin, Chief
Administrative Law Judge

ANG:sid

C.02-11-053 ALJ/AES-POD/sid

Attachment

PRESIDING OFFICER'S DECISION (Mailed 8/28/2003)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pasadena Neighborhood Coalition,

Complainant,

vs.

Altrio Communications, Inc.,

Defendant.

Case 02-11-053
(Filed November 19, 2002)

Anita Taff-Rice, Bowen Law Group, L.L.P., for
Pasadena Neighborhood Coalition, complainant.
Peter A. Casciato, Attorney at Law, for Altrio
Communications, Inc., defendant.

OPINION RESOLVING COMPLAINT

1. Summary

Defendant Altrio Communications, Inc. (Altrio), U-6556-C, has violated the terms of the Limited Facilities Based Certificate of Convenience and Necessity (LFB CPCN) that we granted in Decision (D.) 01-07-022. With respect to any new or potential customers, and with respect to current customers who do not now subscribe to its telephone service, Altrio may not provide, offer to provide, advertise the availability of, or otherwise represent that it will provide telephone service over its Open Video System (OVS) network in Pasadena unless and until it has obtained a full facilities-based CPCN. This proceeding is closed.

2. Statement of Facts

2.1. D.01-07-022

On October 20, 2000, Altrio applied for a CPCN to provide (1) competitive local exchange services in the local exchange operating territories of the state's four non-rural incumbent local exchange carriers, and (2) nondominant interexchange carrier (NDIEC) services throughout the state (Application (A.) 00-10-044). On May 10, 2001, Altrio amended its application asking that we consider its application in two steps. First, Altrio requested that the Commission immediately grant it limited facilities-based (LFB) and resale authority to operate as a competitive local carrier (CLC) within the greater Los Angeles metropolitan area, and as an NDIEC statewide. Altrio's amended application requested that the LFB CPCN include authority to construct various facilities in the Los Angeles area. This construction included what Altrio characterized as three components:

1. Pulling fiber-optic and coaxial cable through existing utility conduit, attaching fiber-optic and coaxial cable to existing utility poles, and installing distribution nodes and optical-electrical interfaces;
2. Installing backup electric generators within existing utility easements; and
3. Installing approximately 1.2. miles of new utility conduit within existing rights-of-way.

Second, Altrio would at a later time file a Proponent's Environmental Assessment (PEA) and ask us to grant it full facilities-based authority to operate as a CLC within the entire local exchange operating territories of the state's four non-rural incumbent local exchange carriers, and as an NDIEC statewide.

On July 16, 2001, we issued D.01-07-022, which granted Altrio an LFB CPCN to provide competitive local exchange telecommunications services

utilizing resale of other carriers' services or unbundled network elements and equipment installed solely within existing buildings or structures. We concluded that the construction activities identified by Altrio in its amended application could not be included in its LFB CPCN, and deferred consideration of the three components to a later decision, leaving the docket open for further consideration after Altrio submitted its PEA. Under the terms of the LFB CPCN, we prohibited Altrio from constructing buildings, towers, conduits, poles, or trenches, as well as the facilities Altrio identified in the three components.¹

2.2. Altrio's OVS Network

2.2.1. Authorization

On November 9, 2000, Altrio was certified by the Federal Communications Commission (FCC) to operate an OVS in Los Angeles, Ventura, and Orange counties.² Altrio's network is not only a cable television system. It is a broadband service capable of delivering cable video, cable modem, and telephone services simultaneously; the individual subscriber chooses which service, or combination of services, to receive.

On December 6, 2000, Altrio filed an application for a franchise to operate as an OVS provider in the City of Pasadena (City). Altrio proposed to provide its services primarily to residential customers in the City. On

¹ Whether we intended to prohibit Altrio from pulling cable through existing utility conduit has been a subject of some controversy in this proceeding. In view of our disposition of this case, it is unnecessary to resolve that question.

² OVS is similar to cable television, but most of the channel capacity on an OVS must be made available to unaffiliated video programming providers.

February 8, 2001, Altrio provided written responses to supplemental questions asked by the City about its application.

The City considered Altrio's application at a City Council meeting on August 13, 2001. At that meeting, an attorney serving as outside counsel for the City orally advised the City Council that the City's action in entering into a franchise agreement with Altrio was exempt from the requirements of the California Environmental Quality Act, Pub. Res. Code § 21000 *et seq.* (CEQA). The City Council adopted Ordinance 6873 on August 20, 2001, authorizing the agreement with Altrio. On August 21, 2001, the City executed "An agreement between the City of Pasadena and Altrio Communications Inc. granting nonexclusive rights to construct and to operate an open video system in the City of Pasadena and setting forth terms and conditions relating to the exercise of those rights" (OVS Agreement). The OVS Agreement is the subject of litigation filed in November 2002, challenging the City's actions on several grounds. In compliance with a ruling of the Administrative Law Judge, Altrio filed in this proceeding a copy of the verified petition for writ of mandate in *Kneisel v. City of Pasadena*, No. BS079863 (Los Angeles Superior Court). We take official notice of the pendency of this litigation, pursuant to Rule 73 of the Commission's Rules of Practice and Procedure.³

2.2.2. Construction

³ Unless otherwise indicated, all subsequent citations to rules refer to the Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations, and citations to sections refer to the Public Utilities Code.

Altrio began construction of the OVS network in October 2001. The network extends from Altrio's offices and headend in Los Angeles, near the City of Glendale, to Altrio's hub and node facilities in Pasadena, and then to the individual subscriber's residence.⁴ From its headend, Altrio has pulled both fiber-optic cable and coaxial cable through existing utility conduits within the office park where Altrio's offices are located. It has attached fiber cable to existing utility poles between its headend and its initial Pasadena hub. From the hub, Altrio's fiber cable, both strung on existing utility poles and put underground, runs to Altrio's distribution nodes, which contain optical/electrical interfaces. Associated with each node is a cabinet containing a battery and a small generator powered by natural gas from gas utility lines, used as backup power sources. Altrio has put in place approximately 46 nodes and associated cabinets. From the nodes, coaxial cable hung on existing utility poles runs to taps on the poles. From the taps, coaxial cable is "dropped" to the individual customer's residence.

2.2.3. Services Provided

As noted earlier, Altrio's OVS is a broadband network that offers its customers cable television, high-speed cable modem, and telephone services. Once at the customer's residence, the signals carried over Altrio's cables are separated to feed the devices that are specific to each service. Cable television service may go directly to the television, but often requires the

⁴ Altrio is providing service only in Pasadena at this time, but intends to expand its network to additional parts of the Los Angeles area, which the PEA identified as Burbank, Glendale, Arcadia, Monrovia, Sierra Madre, La Canada/Flintridge, portions of the City of Los Angeles, and the Altadena area of Los Angeles County.

installation of a set-top box. High-speed modem service requires the connection of a cable modem to the customer's computer. Telephone service requires the connection of a network interface device, typically installed on an outside wall of the customer's house, which both carries the telephone signals to in-home wiring and powers the ringing of the customer's telephone.

Altrio offers each of these three services to its customers. A customer may subscribe to any one service, or any combination of services. Fewer than 2% of Altrio's customers subscribe to telephone service only. Altrio believes that almost all of those customers initially subscribed to cable video and/or cable modem in addition to telephone, but later dropped the other services.

3. Discussion

3.1. The Disputed Construction

In this complaint, the Pasadena Neighborhood Coalition (Coalition) claimed that Altrio has violated its LFB CPCN by constructing a variety of facilities in Pasadena in order to provide its OVS network services. These facilities include utility cabinets containing small batteries and gas-powered back-up generators, as well as the associated distribution nodes; cable hanging from existing utility poles; and new underground conduits for Altrio's cables.

Altrio concedes that it has engaged in this construction and that it will undertake additional construction in Pasadena. It asserts as its sole defense that the construction is validly authorized by Altrio's OVS Agreement with the City and was properly found by the City to be exempt from CEQA. Altrio contends that since the OVS Agreement authorizes construction of the OVS network, there is no role for further Commission review related to provision of telephone services. In Altrio's view, the OVS Agreement provides all the authority it needs

to build and run the OVS network, offering the full range of services (cable television, cable modem for data, and telephone) over the network.

3.2. Requirements of the LFB CPCN

The LFB CPCN that we granted in D.01-07-022 governs the conditions on which Altrio can provide the telephone services we authorized. We did not authorize Altrio to use any facilities or equipment other than existing facilities and equipment installed in existing buildings or structures. We stated that “Altrio shall be prohibited from engaging in any construction of buildings, towers, conduits, poles, or trenches or the construction of facilities identified in Components 1 through 3.” (D.01-07-022, *mimeo.*, at p. 6.)⁵ We found that “a PEA must be filed before the Commission can consider the expanded facilities-based authority requested by Altrio...” (D.01-07-022, *mimeo.*, at p. 9.)

Altrio is providing telephone service to customers in Pasadena using facilities that it has built outside of existing structures, including distribution nodes, backup power supplies in new utility cabinets, and cable hanging from existing utility poles. The LFB CPCN does not allow this. We do not need to decide, and leave to the courts, whether the City properly authorized Altrio to undertake that construction and properly found it exempt from CEQA.

The Coalition contends that Altrio’s construction in its entirety is barred by D.01-07-022. Because the design and components of the OVS network are dictated by the need to maintain highly reliable telephone service, the Coalition asserts, Altrio’s construction activities require our review of Altrio’s PEA. The Coalition’s evidence for this contention was directed to Altrio’s backup power supplies, which the Coalition asserts have very large power capacity solely in order to provide reliable telephone service in the event of a commercial power

⁵ Components 1 through 3 are discussed in Sec. 2.1. of this Opinion.

outage. Although the Coalition demonstrated that substantial backup power is required for Altrio's telephone services, it failed to carry its burden of proof on the claim that telephone power requirements drive the design and construction of Altrio's OVS network. Consequently, we cannot conclude that Altrio's design and construction activity, in itself, violates D.01-07-022.

In sum, even assuming that Altrio's OVS Agreement with the City authorizes Altrio to undertake the construction of its OVS network in Pasadena, the OVS Agreement cannot authorize Altrio to provide telephone service on any terms other than those set out in D.01-07-022. By providing telephone service in Pasadena that uses facilities that were excluded from its authority in the LFB CPCN, Altrio has violated and is violating the terms of the LFB CPCN granted in D.01-07-022.

3.3. Remedy

Altrio is now and has been providing telephone service in violation of the terms of its LFB CPCN. Altrio must begin operating within the limited authority conferred by D.01-07-022. However, requiring Altrio now to cease providing telephone service to its current telephone customers in Pasadena would create hardship for the customers, who are not implicated in Altrio's violation of D.01-07-022 and are relying on Altrio's provision of telephone service. We will instead require that, effective immediately, Altrio may not provide telephone service to any new customers, or to any current customers who do not now subscribe to its telephone service, and must stop advertising the availability of

phone service to potential customers, as part of its OVS network services in Pasadena.⁶

The Coalition urges the more dramatic remedy of a stop work order on the construction of Altrio's OVS network. As explained above, however, the Coalition has failed to show that Altrio's design and construction activity, in itself, violates D.01-07-022. We therefore focus on Altrio's provision of telephone service and restrict it to the terms of the LFB CPCN. These restrictions will remain in effect unless and until Altrio obtains a full facilities-based CPCN. As the Coalition's complaint does not ask the Commission to impose a monetary sanction on Altrio, we will not consider such a sanction in this proceeding.

4. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner. Anne E. Simon is the assigned Administrative Law Judge.

Findings of Fact

1. Altrio was certified by the FCC to operate an OVS in Los Angeles, Ventura, and Orange counties on November 9, 2000.
2. Altrio applied for a CPCN on October 20, 2000, to provide competitive local exchange services in the local exchange operating territories of the state's four non-rural incumbent local exchange carriers, and NDIEC services throughout the state (A.00-10-044).

⁶ The complaint in this proceeding addresses Altrio's activities in Pasadena; our order is therefore confined to Altrio's services in that city. A similar analysis and similar results would apply, however, in any locality in which Altrio sought to provide telephone service over facilities prohibited to it by D.01-07-022, in the absence of a full facilities-based CPCN.

3. Altrio amended its application on May 10, 2001, to request the immediate grant of limited facilities-based and resale authority to operate as a CLC within the greater Los Angeles metropolitan area, and as an NDIEC statewide.

4. In its amended application, Altrio proposed that at a later time it would file a PEA and ask us to grant it full facilities-based authority to operate as a CLC within the entire local exchange operating territories of the state's four non-rural incumbent local exchange carriers and as an NDIEC statewide.

5. D.01-07-022 granted Altrio an LFB CPCN to provide competitive local exchange telecommunications services utilizing resale of other carrier's services or unbundled network elements and equipment installed solely within existing buildings or structures.

6. D.01-07-022 required Altrio to file a PEA before the Commission would consider granting authority for Altrio to construct new facilities.

7. On August 21, 2001, Altrio and the City of Pasadena entered into the OVS Agreement, granting nonexclusive rights to construct and to operate an open video system.

8. Altrio's OVS network to serve Pasadena requires extensive construction, including pulling both fiber-optic cable and coaxial cable through existing utility conduits, attaching both fiber and coaxial cable to existing utility poles, installing distribution nodes containing optical/electrical interfaces, and installing cabinets containing both batteries and natural gas backup generators.

9. Altrio is now offering cable television, cable modem, and telephone services to customers in Pasadena through its OVS network.

10. The interests of current Altrio customers who subscribe to telephone service from Altrio would be harmed if Altrio were required to cease providing telephone services to them.

Conclusions of Law

1. Altrio has authority to provide telephone services in accordance with the terms of D.01-07-022.

2. Altrio is currently providing telephone service over its OVS network in Pasadena in violation of the limited facilities-based authority provided in D.01-07-022.

3. In order to bring Altrio into compliance with its LFB CPCN without causing hardship to current customers who subscribe to Altrio's telephone service, Altrio should not provide telephone service to any new customers, or to any existing customers who do not now subscribe to its telephone services.

4. This order should be effective immediately, in order to prevent further violations of D.01-07-022.

O R D E R

IT IS ORDERED that:

1. Altrio Communications, Inc. (Altrio) may not provide telephone service to any current Altrio customer in Pasadena who was not receiving telephone service from Altrio on the date of this order unless and until it has obtained a full facilities-based Certificate of Public Convenience and Necessity (CPCN).

2. Altrio may not provide, offer to provide, advertise the availability of, or otherwise hold out to new or potential customers that it will provide, telephone service over its Open Video System network in Pasadena unless and until it has obtained a full facilities-based CPCN.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.